

Report of the Hearing Officer
On the
Public Hearing to Amend the
MTC Statement of Information
Concerning Practices of the MTC and
Signatory States Under Public Law 86-272

I. Executive Summary

The Multistate Tax Commission Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272 was the subject of a public hearing on March 15, 2001. Specifically at issue is whether IV.A.20 of the guideline should be deleted as it is contrary to current state law.

The Hearing Officer recommends deletion of IV.A.20 from the guideline, and further recommends the authorization of a By-law 7 survey of the States for consideration in adopting the proposed deletion as a uniformity measure.

II. Report of the Hearing Officer

In 1986, the Multistate Tax Commission developed the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272, as amended 1/22/93 and as further amended 7/29/94. The purpose of the guideline is to assist states and corporate taxpayers to determine potential liability for a net income tax on income derived within the states borders from interstate commerce. P.L. 86-272 (15 U.S.C. §381) is the federal law that prohibits states from imposing net income taxes on a multistate enterprise's business activity in the state, if that activity consists only of the solicitation of orders for sales of tangible personal property, which are forwarded out of state for acceptance or rejection, and are filled by shipment or delivery from a point outside the state (Exhibit 1). The guideline lists specific activities that are considered solicitation and therefore protected by the federal law, as well as those activities that are not solicitation, and therefore fall outside the safe harbor provided by P.L. 86-272.

When the guideline was amended in 1993, one of the unprotected activities listed was the shipment or delivery of goods into a state by means of a private or contract carrier. The federal law is silent on whether the shipment or delivery must be accomplished via a common carrier, the Postal Service or other means of delivery. The provision in the guideline reads in its entirety:

20. Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment of delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.

The statement was included because at least two states were litigating the issue at the time the provision was drafted.

Since then, a number of state courts have considered the question of whether shipment or delivery in the seller's own trucks or by contract carrier falls outside the federal law's protection, and all have rendered opinions that are contrary to the statement in the guideline.¹ (Exhibit 2) The legal reasoning in all of these cases is similar. Essentially, the courts found that because P.L. 86-272 is silent on the method of delivery or shipment, states cannot read more into the statute than what is there. Nothing in the statutory language or the legislative history permits an interpretation limiting delivery or shipment to common carrier; therefore, Congress must have intended the safe harbor to apply regardless of whether delivery or shipment is made by common or private carrier or in the seller's own trucks.

In light of these court decisions, the MTC Uniformity Committee requested the Executive Committee to authorize a public hearing to amend the guideline by deleting IV.A.20. Dan Bucks, MTC Executive Director, appointed Roxanne Bland, MTC Counsel, as Hearing Officer.

The public hearing was held on March 15, 2001. California and Oregon were present at the hearing via teleconference. Other attendees included René Blocker, Deputy Director, and Frank Katz; Deputy General Counsel (via telephone). No members of the public were present. The hearing officer stated the purpose of the hearing, i.e., whether IV.A.20 of the Guideline should be deleted. She also advised that all comments on the Guideline itself would be welcome, but would have no bearing on her final recommendation with respect to IV.A.20.

Oregon advised the hearing officer that IV.A.20 as it appears in the Guideline is not the law in that state. When it adopted the Guideline, it did not include IV.A.20 as a non-protected activity, because the Oregon courts had already ruled that such activity fell within the safe harbor afforded by P.L. 86-272.

California stated that its law was in compliance with the deletion of IV.A.20 from the Guideline.

The Hearing Officer advised that she would hold the period for public comment open until March 31, 2001. The hearing was adjourned.

The Hearing Officer received one written public comment before the hearing. By letter dated March 2, 2001, the Assistant Secretary, Taxes for the Vesper Corporation indicated support for the deletion of IV.A.20 from the Guideline (Exhibit 3). No other written comments were received.

¹ See, e.g., *Revenue Cabinet v. Rohm and Haas Kentucky, Inc.*, 929 S.W.2d 741 (1996); *National Private Truck Council v. Commissioner of Revenue, Massachusetts*, Civ. A. No. 93-5467-H (1997); and *Commonwealth of Virginia v. National Private Truck Council*, 253 Va. 74, 480 S.E.2d 500 (1997).

III. Recommendation

The Hearing Officer recommends that IV.A.20 be deleted from the Guideline. A Bylaw 7 survey should be conducted to determine whether Compact Member States would consider adopting the deletion of IV.A.20 as a uniformity measure.

§ 381. Imposition of net income tax

- (a) Minimum standards

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

- (b) Domestic corporations; persons domiciled in or residents of a State

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

- (1) any corporation which is incorporated under the laws of such State; or
- (2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

- (c) Sales or solicitation of orders for sales by independent contractors

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or tangible personal property.

- (d) Definitions

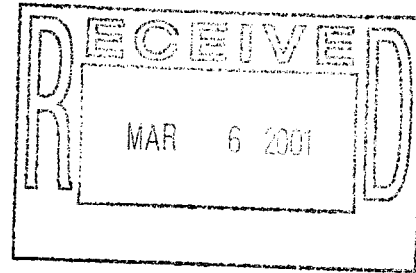
For purposes of this section -

- (1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
- (2) the term "representative" does not include an independent contractor.

List of Affected and Unaffected Multistate Tax Compact Member States

Affected Member States	Unaffected Member States
Alabama	Michigan
Alaska	South Dakota
Arkansas	Washington
California (Franchise Tax Board)	
Colorado	
District of Columbia	
Hawaii	
Idaho	
Kansas	
Maine	
Minnesota	
Missouri	
Montana	
New Mexico	
North Dakota	
Oregon	
Texas	
Utah	

Through the resolution authorizing this survey, the Executive Committee has determined that an affected State within the meaning of Bylaw 7 is any full Member State that has a corporate income tax, a franchise tax based on income or a similar tax. This list reflects our best understanding of which Member States are appropriately classified as an "affected State" within the meaning of Bylaw 7 and which are not. **If you believe we have erroneously classified your State in the *List of Member States*, please advise us of that fact and the basis upon which you have reached the contrary conclusion. If you are an "affected State," regardless of how your State is classified on the *List of Member States*, please be sure to return your survey in all events.**



March 2, 2001

Ms. Roxanne Bland
Hearing Officer
Multi-State Tax Commission
444 North Capital Street NW Suite 425
Washington DC 20001

Re: MTC Guideline
Public Law 86 272

Dear Ms. Bland,

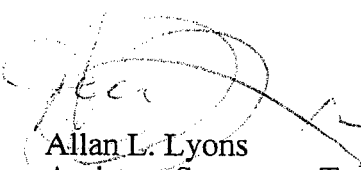
I am writing in support of the deletion of IV.A.20, the shipping and delivering of goods in the state by private vehicle as an unprotected activity. I believe this will go a long way in the realization in today's economy that the shipment of goods by one's own truck is just an extension of the solicitation of orders.

Many small companies are caught in this situation where their customer base lies in two separate states and, to provide good customer service, they deliver products across a state line for the purpose of filling an order. Many times these orders take place in a company showroom but good customer service calls for the delivery to the person's place of business or home.

I commend the Multi-State Tax Commission for recognizing these situations and for taking a proactive stance in giving many small businesses a much welcome and needed reprieve from this onerous section.

I thank the commission for letting people respond. Thank you for your attention in this matter.

Very truly yours,


Allan L. Lyons
Assistant Secretary, Taxes

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